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No. 85-767

In The
Supreme Court of the United States
October Term, 1986

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, ET AL,

Petitioners,

vs.

CREST STREET COMMUNITY COUNCIL, INC., ET AL

Respondents.

ON WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

REPLY BRIEF FOR PETITIONERS

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REPLY ARGUMENT

I. Respondents first argue (Resp. Br. 15-27) that the reference to "proceeding" in "action or proceeding" in Section 1988 suggests congressional intent to allow an award of attorney's fees for administrative proceedings.

A. We do not disagree with the general proposition that the term "proceeding" may include an administrative proceeding. Plainly, that is the case. *New York Gaslight Club, Inc. v. Carey,* 447 U.S. 54 (1980) However, the mere *inclusion* of the term "proceeding" in Section 1988 does not prove conclusive congressional intent to provide attorney's fees for time spent in all administrative proceedings anymore than the *exclusion* of that term would conclusively establish congressional intent to disallow such awards. See *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air,* — U.S. —, 106 S.Ct. 3088, 3095, — L.Ed.2d — (1986). If that were so, *Carey* could have been decided without resort to examination of its enforcement scheme and legislative history. Respondents' entitlement to attorney's fees under Section 1988 does not turn on the broad inquiry whether attorney's fees are *ever* available under Section 1988 for time spent in an administrative proceedings. The correct and necessary inquiry in this case is whether the nature of the activities engaged in by respondents' counsel—participating in meetings and informal negotiations and communicating with NCDOT *et al,* to resolve alleged violations of Title VI[1]—is an activity which Congress

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[1]See FEIS pp. 18-21 for a brief description of these activities. The respondents' statement of Hours and Expenses characterizes

(Continued on following page)

considered to be appropriate for an award of attorney's fees. The language of Section 1988, particularly the mere inclusion of the term "proceeding," is insufficient to establish congressional intent to mandate such an award.

B. Respondents' contention (Resp. Br. 18-23) that the legislative history supports their reading of Section 1988 fails.

1. First, congressional rejection of the Senator Helm's amendment to delete "proceeding" from Section 1988 sheds no light on the meaning of the term, including its relevance to Title VI administrative enforcement. In particular, there is no suggestion that members of Congress intended, by their action, to extend the scope of Section 1988 to include participation in Title VI voluntary conciliation efforts such as those requested by the federal agency in this case.

2. Second, the House Report's reference to *Parker v. Matthew,* 411 F.Supp. 1059 (D.D.C. 1976), relied upon by respondents (see Resp. Br. 18-19), was limited to the Report's assertion, not at issue in this case, that "if the litigation terminates by consent decree, it would be proper to

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(Continued from previous page)

the activities as "meetings," "monitoring," "conferences," not trials or hearings. Appendix, *infra,* pages 10-52. The activities are comparable to the public involvement Action Plan process under 23 U.S.C. § 109(h) and although less formal, to the public hearings under 23 U.S.C. § 128. See *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415 (1971).

award counsel fees" (H. Rep. 1558, 94th Cong. 2d Sess., 7 (1964); there is no need for "a full evidentiary hearing before a judge or jury" (*ibid.*). The Report is no manner refers with "approval" (Resp. Br. 19) to that distinct portion of the opinion concerned with an award of fees for time spent in administrative proceedings. Furthermore, the administrative proceedings at issue in *Parker* were Title VII proceedings, not Title VI informal conciliation efforts and all agree that fee awards are appropriate under Title VII's distinct administrative enforcement scheme.

3. Third, respondents erroneously rely (Resp. Br. 19-20) on the fact that when Section 1988 was enacted, some courts had held that private rights of action under Title VI required prior exhaustion of administrative remedies. As the legislative history of Section 1988 makes plain, in enacting Section 1988 Congress deliberately chose not to address the issue whether a private right of action even existed at all under Title VI. See, *e.g.,* 122 Cong. Rec. 35116 (1964) (remarks of Rep. Railsback). Having refused to address that fundamental threshold issue, one can hardly attribute to that same Congress a view concerning the secondary question of the need for exhaustion of Title VI administrative remedies.

Indeed, as pointed out by the brief of the United States as *amicus curiae* (Br. 18-19), congressional debate concerning the significance of Section 1988 to Title VI reveals that Congress assumed that Section 1988 would apply to Title

VI only in the event that the courts ultimately concluded that an implied private right of action to sue in court existed under Title VI[2]. This legislative assumption is flatly inconsistent with respondents' position, which if adopted would require congressional intent to apply Section 1988 to Title VI administrative proceedings, regardless of the outcome in the courts of the implied private right of action controversy.

Respondents make an attempt to dispute (Resp. Br. 20-22) the plain import of the legislative history by arguing that Congress could not have made the assumption suggested by the United States because regardless of the availability of implied private right of actions, complainants would have been entitled to fees through judicial review of agency action under Section 603 of Title VI, 42 U.S.C. 2000d-2. Respondents' premise is fundamentally flawed, however, because the availability of private complainant challenges under Section 603 to federal agency action is far from clear. The literal language of the provision contemplates challenges brought only by those persons aggrieved by decisions "terminating or refusing to grant or to continue financial assistance" (42 U.S.C. 2000d-2) and not actions brought by persons aggrieved by agency decisions not to make such funding cut-off determi-

[2]It's assumption turned out to be correct. *Cannon University of Chicago,* 441 U.S. 677 (1979); *Guardians Association v. Civil Serv. Commission, N.Y.C.,* 463 U.S. 582 (1983).

nations. Indeed, as this Court has noted, it was in order to provide victims of discrimination with a remedy that certain legislators supported the creation of a private right of action. See *Cannon v. University of Chicago,* 441 U.S. 677, 716 n.52 (1979), quoting 110 Cong. Rec. 5256 (remarks of Sen. Keating) ("Under section 603, a state * * * which is denied funds because discrimination is taking place, is given the right of action in court. But there is no correlative right of action in the citizen. If funds are granted to discriminatory projects by public officials, the citizen who is denied the benefits of the project has no correlative right to bring a suit in court, and he should have."). And, as this Court further stressed in *Cannon,* congressional rejection of an express private right of action in Title VI was designed not to deny the possibility of an implied private right of action against the federal recipient but as a legislative "compromise aimed at protecting individual rights without subjecting the [Federal] Government to suits" (442 U.S. at 715 (footnote omitted)).[3]

II. Respondents' argument (Resp. Br. 27-32) that the activities they engaged in constituted "proceedings" within

[3]Respondents' sole support for the contrary view is an isolated statement in an appendix to a House Report that was signed only by two legislators who, in making it, were offering arguments why the legislation should *not* be enacted (See Resp. Br. 40 n.40)—such a slender and unreliable indicator of congressional intent is entitled to no weight particularly when, as here, the plain meaning of the statute and remarks by the bill's supporters refute its content.

the meaning of Section 1988 reveals the boundlessness of their claim for fees in this case.

A. To be sure, an individual claimant who ultimately settles his Title VI claim may still be entitled to an attorney's fee award, but only if the settlement was pursuant to the claimants' status as a formal party to an action or proceeding to enforce Title VI in which the claimant has prevailed. Hence, there can be no doubt that if respondents had maintained a lawsuit in court under their implied private right of action to enforce Title VI against petitioners and favorably settled their discrimination claims prior to a full evidentiary hearing, Section 1988 might entitle them to an award of attorney's fees for their efforts. On the other hand, if, as what actually occurred, they had favorably settled their implied right of action under Title VI without resort to maintaining an action or proceedings against petitioners, they would not.

B. Respondents, however, ignore the essential threshold requirement that they must be a "party" to a "proceeding" to enforce Title VI and, as a consequence, offer a view of Title VI under which, in effect, any investigations or discussions conducted by a person who claims to be a victim of discrimination by a recipient of federal funds would constitute a "proceeding" to enforce Title VI within the meaning of Section 1988. Respondents would, in effect, equate the term "proceeding" with any effort taken by a victim of discrimination, as long as there was assistance of counsel, to assert the victim's civil rights. The term

"proceeding" would, therefore, be deprived of any meaningful legal significance. One should not ascribe to Congress such an expansive and boundless view of the propriety of attorney's fee awards under Section 1988, at least as applied to Title VI.

C. Instead, as suggested by the United States in its *amicus* submission (U.S. Br. 14-18, 21-22, see also *id.* at 24-26) the better view of Title VI administrative enforcement is that it is exclusively the province of the federal agency as enforcer. The private citizen may, as in this case, become involved by bringing a potential violation to the attention of a federal agency and by participating in informal settlement discussions instigated by the federal agency pursuant to Title VI's explicit demand for voluntary conciliation efforts, but those negotiations do not amount to "proceedings" to which the complainant may be denominated a prevailing party and consequently recover attorney fees from the recipient.[4]

D. Indeed, as respondents have themselves stressed in their brief (Resp. Br. 1, 34), the formal role of the federal agency, even in those negotiations it requests may seem fairly minimal. The absence of substantial formal federal agency involvement does not, however, suggest that the ensuing negotiations constitute private enforcement proceedings or that the federal agency or the federal recipient have accorded the

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[4]Query: if the recipient had "prevailed," what would the respondents say as to their liability for the attorney fees of the recipient under Section 1988?, not "parties?" not "an action or proceeding?"

complainant party status. To the contrary, it underscores that the negotiations are not a federal proceeding to which there are any formal parties at all, anymore than if respondents had initiated the negotiations themselves. Instead the negotiations simply represent one product of the federal agency's effort to harmonize the purposes of the legislative enactment funding the recipient's activities with the nondiscrimination mandate of Title VI.

III. Respondents claim (Resp. Br. 35) that this Court should not consider whether respondents were parties to the administrative proceeding because the issue was neither raised nor ruled on by the parties below. This claim is refuted by the record and, in addition, misapprehends the import of this Court's practice of not entertaining, as a prudential matter, issues raised in the Court in the first instance.[5]

A. First, the district court decision leaves no doubt that the significance of respondents' lack of status as parties to the administrative proceeding was raised and ruled on by the courts below. See Pet. App. 37. The trial court specifically based its decision that respondents were not entitled to fees, in part, on their limited role in the administrative enforcement setting.

B. Second, the argument that respondents are not a party, within the meaning of Section 1988, is not, in

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[5]Petitioners do not dispute that respondents were "parties" to the Final Mitigation Plan agreement or that they were participants in the informal resolution process which resulted in the agreement. Petitioners dispute that respondents were parties in an action or proceeding to enforce Title VI within the meaning of Section 1988 which resulted in the agreement.

any event, the type of "new" issue that this Court has typically chosen not to entertain. The "party" issue is merely the other side of the same coin as the issue whether respondents participated in a "proceeding" to enforce Title VI, within the meaning of that provision. Hence, the alternative characterization of the issue serves only to highlight existing issues and not to inject wholly new legal questions into the dispute.

IV. Respondents' reliance (Resp. Br. 35-40) on certain similarities between Title VI and Title VII administrative enforcement to support their view that attorney's fees awards for participation in administrative enforcement is mistaken. Although the two administrative enforcement schemes share certain features, they nonetheless remain fundamentally different in both nature and design. Their differences, moreover, support the application of varying legal standards for the awarding of attorney's fees.

A. The federal administrative enforcement scheme under Title VII may have as a competing purpose the promotion of the public interest generally, but the administrative framework is, by congressional design, a fundamental, indeed mandatory, aspect of private enforcement as well. Not only is the federal agency specifically empowered to safeguard the interests of the individual, but the individual must himself exhaust the administrative remedy and seek administrative relief for his discrimination claim, prior to bringing lawsuit. The individual complainant is, therefore, a party to the administrative enforcement proceeding under federal law from the moment

that the administrative complaint is filed. Hence, all the activities subsequently undertaken by the complainant subsequent to the filing, including any required deferral to state administrative proceedings (regardless of how the specific state law may denominate the complainants' role (see Resp. Br. 38-39)) or informal conciliation efforts, are activities the complainant takes in his capacity as a party under federal law to the federally-mandated proceedings.

B. Under Title VI, in contrast, filing an administrative complaint does not render the individual complainant a party to the administrative proceeding because, notwithstanding some common features, the nature and purpose of that proceeding is fundamentally different *vis* a *vis* the rights of the individual.

1. While the administrative process is a fundamental aspect of the federal agency's enforcement scheme, it is deliberately not, as it is in Title VII, simultaneously an integral part of the private enforcement scheme; for this reason, it is not even a prerequisite to filing suit for an implied private Title VI claim like it is for Title VII.

2. The reason for this distinction between Titles VI and VII stem from the special "consensual" nature of Title VI's nondiscrimination mandate which, unlike that of Title VII, is rooted in the congressional spending power and depends for its accomplishment on the acceptance of federal funds by certain public and private entities. *Guardians Association v. Civil Serv. Commission of N.Y.C.*, 463 U.S. 582 (1983).

3. Because of its consensual, indeed contractural nature, the federal agency enforcing Title VI is, in certain respects, acting in privity with the recipient of federal funds and, consequently, must be concerned both with Title VI's nondiscrimination mandate and with those legislative purposes dependent upon the activities of the federal recipient. Title VI administrative enforcement, unlike Title VII enforcement, often depends for its successful accomplishment, therefore, on a federal agency striking that delicate balance needed to further both the purposes of the federal legislation funding the federal recipient's activities and Title VI's nondiscrimination mandate.

4. The main thrust of agency enforcement of Title VI provided by Congress is obtaining from the recipient compliance with the Title VI standards prescribed by the agency, and as to which it has expertise in relationship to the assistance program it is charged to administer. Providing individual complainants with party status for their participation in federal efforts to promote informal conciliation and voluntary settlement is fundamentally incompatible with the nature of that federal enforcement function and would, contrary to congressional design, have the effect of converting the federal agency enforcement scheme into (as all agree it is for Title VII) a basic component of private enforcement.

a. Entitlement to attorney's fees for the complainant would inevitably establish a different relationship between the complainant and

federal re ient, by, for instance, enhancing the advers ial nature of their dealings,

b. Application of Section 1988 would also tend to displace the federal agency as the preeminent enforcement authority, replacing an exclusive sphere of federal agency enforcement with an additional mechanism for private enforcement,

c. Indeed, respondents suggest just such a displacement of the federal agency enforcement function in claiming (see Resp. Br. 41) that it is the individual complainants, not the federal agency, who can best enforce Title VI. What respondents ignore is that this Court found an implied private right of action to enforce Title VI in court not just in recognition of the special abilities and needs of private enforcers, but also in response to the substantial need to maintain the independent administrative enforcement function of administrative agencies. The practical effect of respondents' expansive reading of private administrative enforcement of Title VI would be, however, to convert the federal agency enforcement mechanism into the very avenue for private enforcement that this Court assumed Title VI to lack.

C. Respondents are mistaken in their assertion (Resp. Br. 40-45) that petitioners' view will deny respondents the right to secure attorneys, in contravention of the

congressional goal to assist victims of discrimination, and that any problems in disruption of agency enforcement can be adjusted in determining the appropriate amount of fees.

1. Most fundamentally, respondents' argument simply proves too much. All agree, as they must, that Congress intended to provide attorney's fee awards to prevailing victims of discrimination. The only issue in this case is whether Congress intended to place some limitations on either the capacity or the forum in which the victim must be asserting its rights. Under respondents' view, the prevailing victim must be entitled to fees in all circumstances because a contrary view would fail to promote completely the bringing of civil rights claims. Whatever the wisdom of that approach as a matter of policy, we do not believe that the statutory language of Section 1988 established that Congress adopted such a open-ended approach. Instead, in our view, the mere possibility that providing complainants with additional fees might provide additional incentive for private enforcement does not provide a sufficient basis for ignoring the congressional determination to maintain an independent federal agency administrative enforcement scheme. Certainly nothing in Section 1988 suggests such a drastic reworking of Title VI.

2. In addition, it is the characterization of the complainant's formal role in the Title VI administrative enforcement setting, not the precise amount of fees awarded in a given case, that is at odds with the congressional design for Title VI administrative enforcement.

V. Attorney's fees are not recoverable in an independent court action. In *Carey*, the plaintiff, while her mandatory state proceedings to enforce Title VII were ongoing, filed an action in federal court to enforce her Title VII rights and to recover attorney fees under the attorney fees provisions of Title VII. She obtained complete Title VII relief in the state proceedings on the merits, rendering her claim on the merits in federal court moot, but she did not recover attorney fees in the state proceedings. Therefore, in order to obtain the complete relief for a Title VII violation envisioned by Congress in the enforcement scheme provided, she was entitled to recover attorney fees, either in federal court or in the mandated state proceedings. Clearly if the state procedure did not provide complete Title VII relief, she was entitled to obtain the deficit in federal court. Such is not the enforcement scheme for Title VI. Participation by private parties in assisting informal activities to help a federal assistance agency obtain from a recipient voluntary compliance with Title VI requirements (the opportunity for which is required by the Title VI enforcement proceedings) is not an integral part of the private enforcement remedy for Title VI envisioned by Congress, so that when the private citizen fails to recover attorney fees for such participation he has not failed to obtain the complete relief envisioned by Congress in the enforcement scheme for Title VI. The language of Section 1988 itself, when read in the light of the Title VI enforcement provisions, and the legislative history of both acts negates establishment of any such separate private right of action.

VI. Respondents wrongly suggest that petitioners violated an agreement and committed a breach of trust when it filed a motion in the *ECOS* case to dissolve the existing injunction. (Resp. Br. Footnote 8 and Resp. Br. Appendix). There was an agreement that the *ECOS* injunction would not be dissolved until final agreement on the mitigation plan was reached. The motion was filed merely for lead time to provide for service upon the scattered plaintiffs and to put the case in a position to be calendared and heard, if respondents were unable to persuade the *ECOS* plaintiffs not to oppose the motion. Respondents did not object at the time the motion was filed or ask that it be withdrawn. Regardless, the suggestion is irrelevant because the district court found that the respondents' representation as applicants for intervention in the *ECOS* action had no causal connection or acted even as a catalyst to the Final Mitigation Plan agreement.

CONCLUSION

For the foregoing reasons and those set forth in their original brief, petitioners respectfully request that this Court reverse the decision of the Fourth Circuit Court of Appeals in this case and affirm the decision of the District Court.

Respectfully submitted, this the 29 day of September, 1986.

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